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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 546

THE UNITED STATES OF AMERICA, PETITIONER

vs.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA AND CHARLES SINKLER, ADMINISTRATORS, ETC.

No. 547

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, EXECUTORS, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1929
CERTIORARI GRANTED JANUARY 20, 1930

(34677)
(34678)

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1-2 In United States District Court for the Eastern District of Pennsylvania

No. 13444. September term, 1927

UNITED STATES OF AMERICA v. PROVIDENT TRUST COMPANY OF PENNSYLVANIA and Charles Sinkler, administrators c. t. a. of estate of James K. Young, deceased	George W. Coles, Esq. John S. Sinclair, Esq.

Docket entries

Nov.	10, 1927.	Præcipe to issue Summons filed.
"	10, "	Summons exit—returnable 1st Monday in December, 1927.
"	10, "	Statement of claim, filed.
"	29, "	Summons returned: Service accepted as to Provident Trust Co., of Penna., and—served on November 22, as to Charles Sinkler, admx. c. t. a., and filed.
Dec.	9, "	Affidavit of defense raising questions of law filed.
"	21, "	Præcipe to place case on argument list filed.
July	17, 1928.	Argued sur demurrer.
Sept.	10, 1928.	Opinion, Kirkpatrick, J. sustaining affidavit of defense and granting leave to enter judgment in favor of defendants filed.
Oct.	5, "	Præcipe to enter judgment filed.
"	5, "	Judgment upon statutory demurrer in favor of defendants filed.
Nov.	23, "	Assignments of error filed.
"	23, "	Petition for appeal and order of court granting prayer of petition filed.
"	23, "	Præcipe for transcript of record sur appeal filed.
"	26, "	Citation allowed and issued.
"	26, "	Copy of notice of appeal filed.
Dec.	3, "	Citation returned—service accepted and filed.

3 In United States District Court

Statement of claim

Filed November 10, 1927

The United States of America, plaintiff, by George W. Coles, United States Attorney for the Eastern District of Pennsylvania, claims of the defendants the sum of $1,244.43 upon a cause of action, of which the following is a statement:

1. That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

2. That the Provident Trust Company, of Philadelphia, is a corporation organized under and existing by virtue of law of the State of Pennsylvania, with its principal office at 401 Chestnut Street, Philadelphia, Pennsylvania, and that Charles Sinkler is a citizen and resident of the State of Pennsylvania residing at 1601 Walnut Street, Philadelphia, Pennsylvania.

3. That this is an action at law arising under an act of Congress providing for internal revenue, brought to recover taxes due from the defendants.

4 4. That on or about August 28, 1923, James K. Young, being then a resident of Philadelphia, Pennsylvania, died testate, seized, and possessed of real and personal property, tangible and intangible, and left surviving as the sole beneficiary, his wife, Mary Wilson Young.

5. That said Mary Wilson Young, sole beneficiary under decedent's will and the executrix named therein, did on or about the 7th day of September, 1923, renounce her right to act as executrix, and requested the appointment of the defendants as administrators c. t. a., and that on or about the 12th day of September, 1923, the will of said decedent was admitted to probate and letters of administration c. t. a. were granted the defendants, and that at all times hereinafter mentioned the defendants were and now are the duly qualified, lawfully appointed and acting administrators c. t. a. of the estate of James K. Young.

6. That on or about August 26, 1924, the defendants, pursuant to the provisions of the revenue act approved November 23, 1921 (42 Stat. 323), filed with the United States collector of internal revenue for the First District of Pennsylvania, a return, Form 706, for Federal estate taxes, in and on behalf of the estate of James K. Young, deceased, which return disclosed the following:

Gross estate:	
Real estate	$6,500.00
Stocks and bonds	4,069.19
Mortgages, notes, etc	9,261.42
Jointly owned and other miscellaneous property	3,836.70
Total gross estate	$23,667.31
5 Deductions:	
Funeral expenses	$497.50
Administration expenses:	
Executor's fee	858.22
Attorney's fee	500.00
Miscellaneous	128.00
Debts of decendent	2,271.16
Specific exemption (resident, decedents only)	50,000.00
Total deductions	$54,254.88
Total gross estate	$23,667.31
Total deductions	$54,254.88

7. That by deeds dated May 8, 1912, July 24, 1901, and September 16, 1903, there were conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety, the premises known as

#220-222-224 South Sixteenth Street, Philadelphia, Pennsylvania. On June 19, 1923, decedent and his wife conveyed these premises to George W. Eyre for a consideration of $160,000.00, of which $60,000.00 was paid in cash and $100,000.00 taken back by decedent and his wife as ground rent, to yield an annual income of $6,000.00, with the stipulation, however, that the ground rent might be extinguished on or before December 19, 1928. That title to said ground rent vested in the decedent and his wife as tenants by the entirety.

8. That by deed dated June 23, 1923, there was conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety the premises known as #244 South Twenty-first Street, Philadelphia, Pennsylvania.

9. That no part of the consideration for the above properties was furnished by the wife of the decedent.

6 10. That thereafter, on or about April 22, 1925, the Commissioner of Internal Revenue, upon review and audit of the said return and upon information obtained by him determined that under the provisions of the revenue act of 1921 the value of the ground rent and accrued interest thereon, and real estate, above described, should have been included in the gross estate, and that there was a deficiency in estate tax in the case of the estate of James K. Young in the amount of $1,244.43, and gave notice thereof on or about April 22, 1925. The commissioner determined the gross estate, deductions, net estate, and the amount of tax as follows:

Gross estate:	
Real estate	$6,500.00
Stocks and bonds	4,069.19
Mortgages, notes, etc	9,281.42
Jointly owned and other miscellaneous property	154,986.70
Total gross estate	$174,817.31
Deductions:	
Funeral expenses	$497.50
Administration expenses:	
Executor's fee	858.22
Attorney's fee	500.00
Miscellaneous	128.00
Debts of decedent	2,271.16
Unpaid mortgages	33,340.99
Specific exemptions (resident decedents only)	50,000.00
Total deductions	$87,595.87
Total gross estate	$174,817.31
Total deductions	87,595.87
Net estate	$87,221.44
Total tax	$1,244.43

1 11. That the defendants as administrators c. t. a. of the said estate, appealed to the United States Board of Tax Appeals from said notice of deficiency, said appeal being docket #4976, entitled "Appeal of Provident Trust Company of Philadelphia and Charles Sinkler, Administrators, Estate of James K. Young," and said appeal was heard by the board on February 25, 1926.

12. That the decision of the Board of Tax Appeals was rendered January 8, 1927, and is reported in Volume V of the reports of the said board at page 1004 (5 B. T. A. 1004), and that on March 2, 1927, an order of no deficiency was made and entered by the board.

13. That the commissioner does not acquiesce in the decision of the Board of Tax Appeals.

14. That the value of the ground rent, accrued interest thereon, and the real estate, described herein, was lawfully and properly included by the commissioner in the determination of the gross estate of the decedent and that there is due and unpaid from the said defendants to the plaintiff the sum of $1,244.43, together with interest thereon from August 26, 1924, to the date of judgment at the rate of 6 per cent per annum.

15. That due notice and demand has been made upon the defendants for payment of the aforesaid additional tax, but said defendants have failed and refused and still fail and refuse to pay the said sum or any part thereof.

16. That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore the plaintiff demands judgment against the de-
8 fendants in the sum of $1,244.43, together with interest thereon from August 26, 1924, to the date of judgment at 6 per cent per annum, together with costs and disbursements of this action.

GEORGE W. COLES,
United States Attorney.

Duly sworn to by George W. Coles, jurat omitted in printing

In United States District Court

Affidavit of defense raising questions of law

Filed December 9, 1927

Provident Trust Company, of Philadelphia, and Charles Sinkler, administrators c. t. a. of the estate of James K. Young, deceased, the above-named defendants, reserving their right hereafter if necessary to answer the averments of fact in the statement of claim, suggest that the statement of claim as filed by the plaintiff is insuffi-
cient in law for the following reasons:

9 1. The plaintiff's statement fails to disclose any claim against the defendants upon which a judgment can be lawfully entered against them.

2. The value of the ground rent, accrued interest thereon, and the real estate described in the statement of claim was unlawfully and improperly included in the gross estate of the decedent, and the determination of deficiency in Federal estate tax with respect thereto

by the Commissioner of Internal Revenue was improper, unlawful and without authority of law, because,

(a) The ground rent and real estate referred to in the statement of claim were held by the decedent and his wife immediately prior to the death of the decedent as tenants by the entirety;

(b) The common-law doctrine of estates by the entirety obtains in the State of Pennsylvania;

(c) Under the law of Pennsylvania there is no transfer or transmission of property interest by reason of the death of one spouse of any property or interest of that spouse in an estate by the entirety to the surviving spouse;

(d) The nature and incidents of an estate by the entirety constitute a rule of property established by many decisions of the appellate courts of Pennsylvania, and such rule of property is binding on the Federal court in considering the transfer or devolution of property under such rule;

(e) The fact that the decedent paid the full consideration out of his own funds for real estate conveyed to him and his wife as tenants by the entirety can not have the effect of constituting the husband and wife other than tenants by the entirety;

10 (f) Under the provisions of the revenue act of 1921 Federal estate tax is imposed on the transfer of the net estate of the decedent, and since under the law of Pennsylvania there was no transfer of any property or interest in property to the surviving spouse by virtue of the death of the decedent in real estate theretofore held by him and wife as tenants by the entirety, the inclusion of the value of such property held by the decedent and his wife as tenants by the entirety as part of the gross estate of the decedent was without authority in law;

(g) Even if the value of the property held by a decedent and his wife as tenants by the entirety could properly be included as part of the gross estate under the provisions of the revenue act of 1921, yet the value of the ground rent could not be properly included as part of the gross estate inasmuch as the decedent and his wife became seized of the real estate from which the ground rent issued as tenants by the entirety prior to the passage of the revenue act of 1921 and the earlier acts upon which it was based. The reason for this is because the revenue act of 1921 can have no retroactive effect;

(h) If the provisions of the revenue act of 1921 are to be construed so as to require the inclusion as part of the gross estate of the value of the property held by the decedent and his spouse as tenants by the entirety, then such provisions are unconstitutional because there is not transmission of property rights occasioned by the death of the decedent, and to the extent that Federal estate tax is assessed with respect thereto such provisions would operate to deprive the defendants and the estate of which they are administrators of their property without due process of law.

Wherefore the defendants respectfully suggest to the court
11 that the plaintiff's statement of claim does not set forth a valid cause of action and judgment should be rendered for the defendants.

JOHN S. SINCLAIR,
Attorney for Provident Trust Company of Philadelphia, and Charles Sinkler, Administrators, c. t. a. of the Estate of James K. Young, deceased.

DECEMBER 9, 1927.

IN UNITED STATES DISTRICT COURT

Opinion—Sur Statutory Demurrer

Filed September 10, 1928

This is a suit by the United States for the collection of $1,244.43, additional estate tax alleged to be due upon the estate of James K. Young, deceased, brought after an adverse decision by the Board of Tax Appeals reported at 5 B. T. A. 1004. The defendant has filed an affidavit of defense challenging the sufficiency of the statement as a matter of law, and for the purpose of this decision has admitted all the facts averred therein. These facts are as follows:

The decedent died August 28, 1923. By deeds May 8, 1912, [illegible]ly 24, 1901, and September 16, 1908, there had been conveyed to the decedent and his wife as tenants by the entirety certain real estate in Philadelphia. On June 19, 1923, the decedent and his wife conveyed this property for a consideration of $160,000, of which $60,000 was paid in cash. The balance of the consideration was represented by a ground rent reserved by the decendent and his wife, to yield an annual income of $6,000, redeemable upon the payment of $100,000 with ground rent accrued. The ground rent so reserved was held by the decedent and wife as tenants by the entirety.

12 By the deed dated June 23, 1923, there was conveyed to the decedent and his wife as tenants by the entirety certain other real estate in Philadelphia, which premises continued to be so held until the date of the decedent's death. It is conceded that the act of Congress applicable to the case is the revenue act of 1921. The question for decision is whether the value of property acquired by a decedent and his wife as tenants by the entirety and so held by them at the time of the decedent's death may be included in the decedent's gross estate under the provisions of section 402 (d) of the revenue act of 1921.

In Knowlton v. Moore, 178 U. S. 41 (1899), New York Trust Company v. Eisner, 253 U. S. (1920), and Y. M. C. A. v. Davis, 264 U. S. 47, the Supreme Court held that the estate taxes created by the various revenue acts considered in those cases were not taxes upon property but were taxes upon its transmission. While the opinion

of Chief Justice White in Knowlton v. Moore uses some language to the effect that the occasion of the tax is the transmission of the property from the dead to the living, nevertheless, if that opinion be carefully considered, it will be seen that the power of the Congress to tax the transmission of property caused or effected by death is recognized without regard to whether the property itself was ever actually a part of the estate of the person whose death was the occasion of the transfer. So far as this case is concerned the significant principle to be derived from that decision is that transmission by death and not transmission from the dead is the generating source from which the taxing power exercised takes its being. No distinction is drawn between a transmission of property from a decedent upon his death and a transmission of property to a living person upon the death of another, and so far as the power to tax is concerned none exists.

13 A general power is given by the Constitution to Congress to lay or collect taxes of every kind or nature without any restraint, except on exports. This power is subject to only two qualifications—direct taxes must be imposed by the rule of apportionment and indirect taxes by the rule of uniformity. Hilton v. U. S., 3 Dall. 174; Kelly v. Lewellyn, 274 Fed. 108. If a tax is laid upon the transmission of a property, it is not laid on the property itself (Knowlton v. Moore, supra) and is not a direct tax and need not be apportioned. In case of an estate tax it is immaterial to the question of constitutionality whether the property taxed passes from the decedent at his death or whether it merely passes or is transmitted upon the occasion of his death. Thus in a recent case decided by this court (Fidelity-Philadelphia Trust Co. v. McCaughn, not reported) it was held that Congress had the power to tax property passing under a general power of appointment exercised by will, although the property itself had never formed any part of the estate of the decedent who exercised the power. The power of Congress being granted the question in that case became one of the intention to exercise it as evidence by the terms of the act.

It is, however, necessary that there be some transmission or transfer of property effected by the death of some person. If no such transmission has occurred, then there is no privilege or right toward which the taxing power could have been directed and the tax can fall nowhere except directly on the property in question and will therefore be a direct tax and unconstitutional. Where there is a real transmission of property arising by reason of death, a tax may be properly levied upon it. Where there is no such transmission, an attempted exercise of the taxing power is unconstitutional.

In this case we may concede for the purpose of this decision
14 the intention to tax, upon the death of either spouse, property held by the husband and wife as tenants by the entirety, but the question remains, Has the death of the husband occasioned a "transmission" of anything to the wife. The answer depends upon

the character of the interests which exist under an estate by the entirety as defined by the law of Pennsylvania. The Supreme Court of Pennsylvania had occasion to consider this point in Biehl v. Martin, 236 Pa. 519. In the course of that opinion, the court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife. It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one, while the right of survisorship remains to the other, that other takes no new title or estate."

It will thus be seen that the death of the husband does not effect the transmission of any property. The quantum and nature of the estate or interest of the wife in the property is exactly the same after the husband's death as it was before. As the court pointed out, the husband's connection with the estate was merely that of an "adjunct" to that of the wife and vice versa. Before the husband's death the estate was owned and possessed by a legal entity or personage, viz., husband and wife, who in certain aspects under the law constitute one person. After his death the legal personage became an individual, the natural person, the wife. Nothing has passed to her which she did not have before. There has been no change in her interest. Her own status under the law has changed, but not the nature of her property.

The foregoing case as well as O'Malley v. O'Malley, 272 Pa. 528, Meyers Estate, 232 Pa. 89, and Blaise v. Anderson, 241 Pa. 98, all show that the Pennsylvania legislation affecting the property rights of married women has not in any way changed the nature of tenancy by the entirety in this State. These cases are effective answers to the suggestion that this estate had its rise in a legal fiction now to a large extent discarded and the conclusion is therefore reached that so far as the revenue act of 1921, section 402 (d), intends to include for taxing purposes, in the gross estate of the decedent, property held by him and his wife as tenants by the entirety, it is beyond the constitutional power of the Congress.

The affidavit of defense is sustained, the statement of claims adjudged insufficient, and judgment may be entered for the defendant.

By the court.

W. H. KIRKPATRICK, *J.*

In United States District Court

Præcipe for judgment

Filed October 5, 1928

To the CLERK:

Enter judgment in the above matter in favor of the defendants upon statutory demurrer in accordance with the opinion rendered by the Court.

(Sgd.) JOHN S. SINCLAIR,
Attorney for Defendant.

16 In United States District Court

Judgment

Filed October 5, 1928

Before KIRKPATRICK, *J.:*

And now, October 4, 1928, in accordance with the opinion of the court and by præcipe filed, judgment upon statutory demurrer is hereby entered in favor of defendants and against the plaintiff.

By the court.

Attest:

E. G. JOHNSON,
Deputy Clerk.

In United States District Court

Assignments of error

Filed November 23, 1928

And now, to wit, the twenty-third day of November, 1928, comes the United States of America, plaintiff, and by its attorney, George W. Coles, United States attorney in and for the Eastern District of Pennsylvania, makes and files this its assignments of error:

1. The District Court of the United States for the Eastern District of Pennsylvania erred in sustaining the affidavit of defense raising questions of law.

2. The District Court of the United States for the Eastern District of Pennsylvania erred in entering judgment for the defendants, and

3. In refusing to enter judgment for the plaintiff.

GEORGE W. COLES,
U. S. Attorney.

17 In United States District Court

Petition for appeal

The above-named plaintiff, United States of America, conceiving itself aggrieved by the judgment entered on October 7, 1928, in the above-entitled proceeding, doth hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, and it prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

GEORGE W. COLES,
Attorney for Plaintiff and Appellant.

In United States District Court

Order allowing appeal

Before KIRKPATRICK, *J.*:

Prayer of the foregoing petition for appeal is hereby granted.

By the court.

Attest:

GEORGE BRODBECK, *Clerk.*

18 In United States District Court

Præcipe for transcript of record

Filed November 23, 1928

To the CLERK OF THE COURT:

Prepare transcript of record in the above-entitled case for filing in appeal to the Circuit Court of Appeals and include the following:

Docket entries.

Statement of claim.

Affidavit of defense raising questions of law.

Opinion, Kirkpatrick, *J.*, sustaining affidavit of defense raising questions of law and permitting judgment to be entered in favor of the defendants.

Judgment in favor of the defendants.

Assignments of error.

Petition for writ of error.

Order allowing writ of error.

Præcipe for transcript of record.

Clerk's certificate.

GEORGE W. COLES,
United States Attorney.

19 [Clerk's certificate to foregoing transcript omitted in printing.]

20 [Minute entry of argument and submission, Mar. 14, 1929, omitted in printing.]

21 In United States Circuit Court of Appeals for the Third Circuit

No. 4009. March term, 1929

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA, AND CHARLES SINKLER, Administrators C. T. A. of Estate of James K. Young, deceased, appellees

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed October 4, 1929

Before BUFFINGTON, WOOLLEY, and DAVIS, *Circuit Judges*

WOOLLEY, *Circuit Judge:*

James K. Young and Mary Wilson Young, his wife, acquired as tenants by the entirety several parcels of real estate in Philadelphia. Later they conveyed some of them for a consideration part paid and the balance secured by a ground rent, reserved to themselves as tenants by the entirety, to yield them a certain annual income, redeemable at a named figure.

James K. Young died in 1923. The Commissioner of In-
22 ternal Revenue, upon review and audit of the estate tax return made by his administrators, included in the decedent's gross estate the value of the ground rent and other property, so held, and determined a deficiency in the sum of $1,244.43. From this action Young's administrators appealed and the Board of Tax Appeals entered judgment against the commissioner. 5 B. T. A. 1004. The United States then brought this suit in the District Court against Young's administrators to collect the additional tax so determined. The court, on facts averred in the statement of claim and admitted by the affidavit of defense, raising a question of law as though on demurrer, held that the Congress, by including for taxing purposes in the gross estate of a decedent property held by him and his wife as tenants by the entirety exceeded its constitutional power and entered judgment for the defendants. The case is here on the Governme s appeal.

The tax was assessed under the revenue act of 1921. That act, by section 401, imposes a tax "upon the transfer of the net estate of every decedent dying after" its passage. Section 400 defines "net estate" to mean "the estate as determined under the provisions of section 403." This section provides that the "net estate shall be determined by deducting from gross estate" certain items with which we are not concerned. To obtain a net estate there must, of course, first be a gross estate. So section 402 provides that the gross estate of a decedent shall include the value at the time of his death of all

property, real and personal, "to the extent of the interest therein held jointly, or as tenants in the entirety, by the decedent and any other person."

In a word, the Congress provided that the value of property held at the time of death by a decedent and his spouse as tenants by the entirety shall be included in the deceased tenant's gross estate, and imposed a tax upon the transfer of the resultant net es-
23 tate. The single question in this case is whether or not the Congress had power to draw such an estate within its reach and impose an estate tax upon it.

The effective words of the quoted provisions of the revenue act are "transfer" and "net estate." The Congress in these provisions and in like provisions in other revenue acts has been careful to impose the tax not upon property but upon the "transfer" of an interest in property, and the courts in construing the provisions have said, again and again, that the tax is not upon property but upon the privilege of transferring it. Thus the acts avoid imposing a direct tax, which to be valid must be apportioned. Section 2, clause 3, and section 9, clause 4, of Article I of the Constitution. Hilton v. United States, 3 Dall. 174.

But the meaning of the word "transfer" as interpreted by the courts is not so literal as at first it would seem to be. Therefore, in order to determine whether the interest of a deceased tenant by the entirety constitutes an "interest" in his property which from its nature can be included in his gross estate, and whether on his death there is a transfer of such an interest to his cotenant which is taxable as a part of his net estate, we shall look into the meaning of a "transfer" as the subject of taxation.

The earliest pronouncement upon the subject was made in Knowlton v. Moore, 178 U. S. 41, which was a full recognition that the transmission of some interest in property occasioned by death is the basis for the imposition of an estate tax as distinguished from a direct tax on property.

Reviewing the field of death duties and bringing the act then under review within its boundary, the Supreme Court stated that:

"Tax laws of this nature in all countries rest in their es-
24 sence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

Knowlton v. Moore has been cited in practically every case in which Federal estate tax acts have been involved and we know of no instance in which the court's declaration of the principles upon which such acts are based has been departed from.

The tax has ever been treated as a duty or excise because of the particular occasion which gives rise to its levy. New York Trust Co. v. Eisner, 256 U. S. 345; Y. M. C. A. v. Davis, 264 U. S. 47. The subject of the tax—the event upon which the tax is predicated—is the transmission of some interest in property occasioned by death; hence

the classification of estate taxes as death duties. If no interest is transmitted, or if no transfer takes place by the event of death, the subject of the tax is absent, and accordingly no estate tax can be validly imposed. While steadfastly adhering to the principle that death is the generating source from which the taxing power takes its being, the Supreme Court has recognized transfers subject to the tax that had been made otherwise than by death yet made finally effective at death, such as transfers made before death yet in contemplation of death, transfers in trust made before death with power reserved by the settler to revoke them, Reinecke v. Trust Company, 278 U. S. 339; transfers of insurance policies with power reserved by the insured to change the beneficiaries, Chase National Bank v. United States, 278 U. S. 327; and transfers of property with a reserved power of appointment, Saltonstall v. Saltonstall, 276 U. S. 260.

In all these cases the transfers had not been completely ef-
25 fected or the privilege of succession or the right of possession or enjoyment fully exercised before death. But in all death terminated reserved powers of control and effected final transfers to the advantage of those who had obtained the properties subject to the powers. Thus there was brought about at death, or by death, a "shifting of the economic benefits and burdens of property which is the real subject of the tax." Saltonstall v. Saltonstall, supra.

A pertinent distinction is that the tax is not upon the interest to which another succeeds on death but is an excise upon the transfer of the estate of the owner upon his death, to be reckoned upon the value of the interest transferred. Y. M. C. A. v. Davis, 264 U. S. 47, 50; Edwards v. Slocomb, 264 U. S. 61. Nor is the tax limited to a transfer of property directly from the decedent to the transferee, but extends at least to a transfer of property which, though not the decedent's was produced by him with the purpose, effected at his death, of having it pass to another.

Thus do the courts regard a "transfer"—the thing taxed—as it appears in the provision of the revenue act under review. Of course, if there is no transfer there is no valid tax. But the act imposes the tax upon something more than a transfer—namely, "upon the transfer of the net estate" of a decedent. So, also, if there is no net estate of the decedent, there is no valid tax. Thus we come to the question whether on the death of one tenant by the entirety there is any "interest" in his estate which, because of a transfer to the other tenant occasioned by his death, falls into his gross estate and later becomes taxable as a part of his net estate. The answer to this question by a Federal court depends primarily on the character of a tenancy by the entirety under the law as declared by the courts of the State in which it exists, for a construction or definition of
26 the estate by the courts of the State constitutes a rule of property which is binding upon Federal courts in considering its devolution or transfer. DeVaughn v. Hutchinson, 165 U. S. 566, 570; Clarke v. Clarke, 178 U. S. 186; Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 464.

A tenancy by the entirety in Pennsylvania retains in their purity all the characteristics of its English origin. A quotation from one of many decision by its courts, always in harmony, will disclose the rule of property which Pennsylvania has laid down in respect to an estate of this character.

In Biehl v. Martin, 236 Pa. 519, 522, decided as recently as 1912, the Supreme Court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject.

"Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one while the rights of survivorship remain to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unity made up of divisible parts; that of a husband and wife is also a unity, but is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased
27 cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individual identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.'" Stuckey v. Keefe, 26 Pa. 397.

Federal courts in the Third Circuit have from time to time recognized the authority of the aforegoing case. Getty v. A. Hupfel's Sons, 292 Fed. 178; 299 Fed. 939. (1923, 1924.)

The courts of Pennsylvania are entirely consistent in carrying into effect, even in matters of taxation, the rule of property thus declared. The transfer inheritance tax statute of Pennsylvania provides a succession tax. In a case where an attempt had been made to tax a tenancy by the entirety it was contended (as it is contended in the case at bar) that the transfer did not take effect in possession and enjoyment until after the death of one of the tenants and that it was then that the possession and enjoyment passed to and became effective in the surviving spouse. The court held that, as the right

of possession and enjoyment arose at once in favor of both grantees, the survivor received nothing by virtue of the death of her husband which might be the subject of the tax. Estate of Henry G. Fink, 6 Erie County Law Journal, 281 (1922).

This Federal court is thus confronted by a rule of property, in respect to "descent, alienation, and transfer," definitely established by the law of the State in which the land is situated. DeVaughn v. Hutchinson, 165 U. S. 566, 570. If only we could ignore what
28 some term the "technical characteristics" of a tenancy by the entirety (which Pennsylvania, however, has declared to be its basic characteristics), regard the legal unity of husband and wife as "pure fiction," and look upon the estate as a "practical matter," the problem would be easy to solve. But we must face the problem precisely as the Commonwealth of Pennsylvania and the Congress have presented it. That it is a problem the Government recognizes by its concessions in its brief that "In the case at bar . . . neither the title nor the estate nor the interest of the survivor was created by the death of the decedent"; and that "Congress has undertaken, in spite of the well-established rule that there is no transfer of title or of interest or of estate from one tenant by the entireties to another upon death," to impose a tax upon estates of this class. The Government, however, meets this legal difficulty by stating (what is true) that in this case on the death of one tenant "there was a change in the incidents of the survivor's estate," and that Congress provided "that the change in the relation of the wife to the property shall be considered a transfer affording a proper subject matter to be taxed."

By these concessions the Government rather begs the question, or very nearly admits the question out of the case, for the question concerns the power of the Congress to do what it did, namely, to tax as a transfer an interest in an estate of this kind on death when in an estate of this kind there is no transfer on death. If there be no transfer the Congress, "under the mere guise of reaching something within its powers, . . . may not lay a charge upon what is beyond them." Nichols v. Coolidge, 274 U. S. 531, 541.

The Government, by basing its case upon a "change" in the rela-
29 tion of the two tenants, occasioned by the death of one, as the subject matter to be taxed, manifestly can succeed only if that change amounts in law to a transfer. On the theory of taxable change an argument may be made something like this:

On the instant of the husband's death in this case the estate by the entirety ended; then the wife acquired another estate—an unfettered fee—of which she became the sole owner. The instant he died the wife had something she did not have before. True, in the theory of a tendency by the entirety, she had, as before, the whole estate, yet it is now shown of the incident of her husband's right of survivorship. What came to her on her husband's death necessarily passed from him. Thus his death generated not merely a change

of owner but a change of estate. He being first to die, that which left him was his right of survivorship, and while, of course, his right of survivorship could not as such pass to his wife, it nevertheless passed out of legal existence and thus effected a change or transfer of an interest in property which once was wholly his and which now is wholly hers. But for the husband's death, his wife, though in fiction holding the whole estate, would continue to hold actually a limited interest in the estate, yet by reason of his death the estate by the entirety ceased, a change in the estate was wrought, and her interest in the estate by reason of his death and her survivorship became unqualified and absolute. Of course this line of reasoning overlooks the legal fact that the generating source of the wife's estate, even after her husband's death, was not his death but the instrument that created the estate, and it also overlooks the significant principle declared in Knowlton v. Moore that transmission by death (not transmission from the dead) is alone the generating source from which the taxing power, here exercised, takes its being.

And thus we are back to where we were at the start. Was there a " transfer " of an interest occasioned by death? A mere change of status, though accompanied by economic benefits, does not necessarily involve a transfer of an interest in property, even if the change be brought about by death. It can hardly be said that the change effected by death of the tenant of a particular estate involves a transfer of his estate to the remainderman when, in law, the two estates were created at the same time long before, the estate of the remainderman having vested at the time of its creation. Nor does the mere ceasing or ending of an estate, distinguished from the ceasing of an estate with reserved powers not exercised, constitute a transfer or provide a subject matter for taxation for when, as in the instance of a vested remainder, the particular tenant dies, all that he had ceases to be his and passes out of him, it is true, but it passes out of him by virtue of the instrument of its creation, and the economic benefits which usually and naturally enure to the remainderman (or other person succeeding) are occasioned not by his death but by that instrument. A change in an estate or a cessation of an interest in an estate whereby nothing is left in or transferred through the estate cannot create something in the " net estate " of a decedent on which to base an estate tax.

Keeping in mind that each tenant by the entirety is completely seized of the whole estate by virtue of the creative instrument, and that when one dies the other takes nothing by a new title but merely ceases to divide its enjoyment, United States v. Robertson, 183 Fed. 7, 11, we inquire, what passed out of the husband in this case when he died? Certainly his right of survivorship. What came to the wife when he died? Not a moiety or other part of the estate, because the prior holding had not been joint; and certainly not the whole of the estate, for that she already had acquired and continued to hold

under the instrument which created the estate. What was the
31 result of the husband's death upon her? She got rid of him and his right of survivorship and of any obligation on her part to divide the enjoyment of the property with him. The interest of both being per tout et non per my—that is, where neither is a tenant of a moiety but each is a tenant of the whole, when the husband died his tenancy simply ended and the wife's simply continued precisely as it was arranged by the original instrument. When, as here, the husband died, the wife received nothing from him. She already had all there was to be had—the whole estate. Therefore on his death nothing was transferred from him to her. He stopped and she went on, and still goes on, just as she began without wating upon, or being dependent upon, any transfer of his interest in the property theretofore held by them as tenants by the entirety—unless, indeed, the "change" which followed the husband's death resulted in a shifting of the economic benefits and burdens of property, including thereafter her sole right to alien, encumber and devise, and unless this shifting of benefits and burdens amounted in itself to a "transfer" to her of an "interest" which belonged to her husband and which on his death fell into his gross estate and thereafter became a part of his net estate subject to tax within the latitude which the decisions have given to that expression. Unless we ignore the peculiar yet essential characteristics of a tenancy by the entirety which grew up in the common law and persisted without change through the law of Pennsylvania, we cannot find that on the death of one tenant the interest which he had in the estate when living is, by reason of his death, transferred to the tenant surviving, nor, remembering that each tenant is seized of the whole, can we find that on the death of one the value of the whole property shall be taken as the measure of the interest claimed to be transferred, as though he were
32 the sole owner, or that the tenant surviving, also holding the whole title, should have the value of her estate taken as the basis and measure of the decedent's tax.

We are constrained to hold with the learned trial judge that it was beyond the constitutional power of the Congress, exercised by section 402 (d) of the revenue act of 1921, to include in the decedent's gross estate property held by him and his wife as tenants by the entirety. Holding, therefore, that the tax assessed by the commissioner under section 401 of the act is void, the judgment of the district court is affirmed.

A true copy.
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

32 In United States Circuit Court of Appeals for the Third Circuit

No. 4000 (list No. 46). March term, 1929

UNITED STATES, APPELLANT

vs.

PROVIDENT TRUST CO. ET AL., ADMRS., J. K. YOUNG, DEC'D., appellees

Judgment filed

Oct. 4, 1929

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania,

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, October 4, 1929.

VICTOR B. WOOLLEY,
Circuit Judge.

[File indorsement omitted.]

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35-36 Before U. S. Board of Tax Appeals

Docket Number 11298

GIRARD TRUST CO., AND JOSEPH L. Woolston, executors of the will of Beulah H. J. Woolston, dec'd., petitioner	For taxpayer: J. Snowdon Rhodes, Esq.
v.	
COMMISSIONER OF INTERNAL REVENUE, respondent	For commissioner: Frank T. Horner, Esq.

Docket entries

Jan.	25, 1926.	Petition received and filed.
"	28, "	Copy of petition served on solicitor.
"	" "	Notification of receipt mailed taxpayer.
Mar.	29, "	Answer filed by solicitor.
Apr.	3, "	Copy of answer served on taxpayer. Assigned to general calendar.
June	7, "	Stipulation as to hearing filed (1).

Dec. 6, 1927. Hearing date set 1-19-28.
Jan. 19, 1928. Hearing had before Mr. Siefkin on merits—Petitioners brief filed at hearing—Respondents brief due Feb. 20, 1928.
" 21, " Transcript of hearing of 1-19-28 filed.
" 26, " Brief filed by G. C.
Feb. 29, " Decision rendered. Mr. Seifkin. Judgment will be entered on 15 days' notice, under rule 50.
Apr. 13, 1928. Notice of proposed redetermination filed by G. C.
" 17, " Notice allowing taxpayer until 5-10-28 to file alternative settlement for hearing 5-17-28, failure to do so hearing date set 5-15-28.
May 7, " Consent to settlement filed by taxpayer.
" 12, " Order of redetermination, entered.
Nov. 5, " Petition for review by U. S. Cir. Ct. of Appeals, 3rd Cir., with assignments of error filed by G. C.
" 9, " Proof of service of petition filed.
" 16, " Praecipe with service thereon filed by G. C.
[Certificate to foregoing paper omitted in printing.]

37 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed January 25, 1926

The above-named taxpayers hereby appeal from the determination of the Commissioner of Internal Revenue, set forth in his deficiency letter (MT-ET-CL-4273-CLMcC), dated December 7, 1925, and as the basis of their appeal set forth the following:

(a) Girard Trust Company, one of the above-named executors, is a Pennsylvania corporation, having its business at the N. E. cor. of Broad and Chestnut Streets, Philadelphia, Pennsylvania. Joseph L. Woolston, the other executor, resides at 429 W. Chestnut Avenue, Chestnut Hill, Philadelphia.

(b) The deficiency letter, a copy of which is attached hereto, was mailed to the taxpayers on or about December 7, 1925.

(c) The tax in controversy is an alleged deficiency of Federal estate tax, which deficiency has not yet been assessed and approximates the sum of $2,205.32. The decedent died February 8, 1924.

38 (d) The determination of said deficiency of tax, as contained in the said deficiency letter, is based upon the following errors:

1. The Commissioner of Internal Revenue, in his letter of December 7, 1925, erred in finding that the real estate known as No. 429

W. Chestnut Avenue, Chestnut Hill, Philadelphia, Pennsylvania, is subject to taxation under section 402 (d) of the revenue act of 1921.

2. The Commissioner of Internal Revenue in his said letter erred in finding that said premises "should be included in the gross estate" of Beulah H. J. Woolston, deceased.

3. The Commissioner of Internal Revenue in his said letter erred in finding that real estate held by the decedent and her husband "as tenants by the entirety" should be deemed a part of the decedent's estate within the meaning of the revenue act of 1921.

4. The commissioner erred in finding that the deficiency tax of $2,205.32, as set forth in the bureau's tentative audit of May 6, 1925, and in the deficiency letter of December 7, 1925, is correctly determined.

5. The commissioner erred in sustaining the tentative determination of the bureau that the sum of $186,810.69 constitutes the net estate and that the total amount of tax thereon is $3,604.32.

6. The commissioner erred in disallowing the protest made by the taxpayers against the assessment of any additional tax.

39 (e) The facts upon which the taxpayers rely as the basis of their appeal are as follows:

Prior to the year 1923 the premises known as 429 W. Chestnut Avenue, Chestnut Hill, Philadelphia, became vested in the decedent in fee simple. On April 27, 1923, the decedent (her husband joining in the deed) conveyed said premises to Guy B. Watton, his heirs and assigns, in fee simple. On April 30, 1923, the said Guy B. Watton conveyed the said premises to Joseph L. Woolston and Beulah H. J. Woolston, his wife (the decedent), "Their heirs and assigns," "as tenants by the entireties."

The taxpayers aver that the decedent and her husband having been thus seized of said real estate as tenants by the entireties, the title to the whole thereof has now become vested by operation of law in the surviving husband, that neither said real estate nor any interest therein constituted a part of the decedent's estate, and that the same is, therefore, not subject to the Federal estate tax.

(f) The taxpayers in support of their appeal rely upon the following propositions of law:

Property held by husband and wife as tenants by the entireties is not a part of the estate of the spouse who dies first. The entire property automatically becomes the property of the surviving spouse by reason of the nature of the title by which the property was held, and not by virtue of the will of the decedent or by reason of the intestate law. The surviving husband does not take as upon a transfer from the wife at her death, but takes "under the original grant, her estate ceasing." This is in accordance with the decision in the case of Blount against the United States, decided March 3, 1924, Court of Claims of the United States, and now on appeal in the Supreme Court of United States, but not yet decided.

40 Wherefore, the taxpayers respectfully pray that this board may hear and determine their appeal.

GIRARD TRUST COMPANY,
A. A. JACKSON,
Vice President.

Attest:

C. NORRIS, *Secretary.*
JOSEPH L. WOOLSTON,
Executor.

[*Duly sworn to by Joseph L. Woolston; jurat omittted in printing.*]

41 *Exhibit to petition*

TREASURY DEPARTMENT,
Washington, December 7, 1925.

(Cut of seal)
Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
And refer to

MT-ET-Cl.-4273-CLMcC
District of 1st Pennsylvania.
Business of estate of Beulah H. J. Woolston.
Date of death—February 3, 1924.
Deficiency tax—$2,205.32.

GIRARD TRUST COMPANY ET AL.,
Executors estate of Beulah H. J. Woolston,
Broad and Chestnut Streets, Philadelphia, Pennsylvania.

SIRS: The bureau has examined the protest filed by you as executors of the above-named estate against the tentative findings as set forth in its letter addressed to you under date of May 6, 1925.

The protest arises in connection with the following item:

	Jointly owned and other miscellaneous property	Returned	determined
Property known as #429 West Chestnut Avenue, Chestnut Hill, Pennsylvania, jointly held by the decedent and Joseph L. Woolston		$ .00	$93,000

42 This property was included in the tentative audit at the figure herein determined. The estate's protest to the effect that the interest of this decedent is not taxable due to the fact that the property was held by tenancy of the entirety, the interest of the survivor in the whole thereof being just as it was before the death of one of the tenants has been duly noted.

The bureau has given careful consideration to the estate's contentions. The facts involved in this question appear substantially as follows:

Sallie S. Houston conveyed to Beulah H. J. Woolston, this decedent, the realty as her sole and separate estate. The husband's name was not mentioned in the deed. The decedent held this property as her sole and separate estate for about 13 years, when, on April 27, 1923, she conveyed the premises to Guy B. Watton, who, three days later, on April 30, 1923 reconveyed the same to Joseph L. Woolston and Beulah H. J. Woolston, his wife, this decedent, as tenants by the entirety. No consideration whatever passed in these transactions, it being certified in the deed that the consideration in both instances was less than $100, a merely nominal sum. It is very evident that Guy B. Watton was merely used as a straw man in order to acquire title in this decedent and her husband as tenants by the entirety.

The portion of the revenue act of 1921 applicable to the facts at hand in section 402 (d) as construed by article 23, regulations 68, pertaining to estate tax. Therefore, based upon all the facts of record, the application of the revenue act and regulations indicate that the entire value of the property in question properly formed a part of the gross estate of this decedent, as "the decedent furnished the entire purchase price, the entire property should be included in the gross estate." Adjustment is made on this basis.

43 In view of the foregoing, the gross estate is determined to be $253,793.84, the deductions $66,983.15, and the net estate $186,810.69, the tax upon the transfer of which is $3,604.32. As a tax of $1,399 was satisfied by the estate, the deficiency in the tax amounts to $2,205.32.

The deficiency tax herein shown, or such part thereof, if any, as may be ultimately assessed, will bear interest at the rate of ten per centum per annum from and after one month after notice and demand by the collector until paid, in accordance with the provisions of section 407 of the revenue act of 1921.

In accordance with the provisions of Title III, part 1, of the revenue act of 1924 you are allowed sixty days from the date of this letter within which to file an appeal to the Board of Tax Appeals, contesting in whole, or in part, the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the sixty days prescribed, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect to any part of a deficiency will be entertained.

If you acquiesce in this determination, either in whole or in part, and do not desire to file an appeal from the findings in which you acquiesce, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency resulting therefrom, and forward it to the Commissioner of Internal Revenue, Washington, D. C., marked for the attention of the Estate Tax Division, Miscellaneous Tax Unit.

If you desire to appeal from the action of the bureau, as disclosed in this letter, your appeal should be addressed direct to the
44 United States Board of Tax Appeals, Earle Building, 13th & E Streets Northwest, Washington, D. C.
Respectfully,

D. H. BLAIR,
Commissioner.

Enclosure
ACS

[Certificate of foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Answer

Filed March 29, 1926

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, in answer to the petition of the above-named taxpayers, admits, denies, and avers as follows:

1. Admits the allegations set forth in the paragraphs of the petition designated (a), (b), and (c).

2. Denies that error was committed in the determination of the deficiency tax as set forth in the paragraphs of the petition designated (d) 1, 2, 3, 4, 5, and 6.

3. Admits the facts alleged in the paragraph of the petition designated (e) except so much thereof as alleges that neither the said real estate nor any interest therein constituted a part of the decedent's estate and the same is therefore not subject to Federal estate tax, and as to the part excepted denies the same.

45 By way of affirmative defense the commissioner alleges that Beulah H. J. Woolston died February 3, 1924, leaving a net estate the transfer of which is subject to Federal estate tax under the provisions of the revenue act of 1921.

In support of his answer the commissioner relies upon the proposition of law that in the case of a decedent dying while the revenue act of 1921 is in effect, leaving an estate the transfer of which is subject to Federal estate tax, there is properly included in the gross estate for the purpose of determining the Federal estate tax the value of the interest held by the decedent and spouse in any property as tenants by the entirety where such property originally belonged to the decedent.

Wherefore it is respectfully prayed that the determination of the commissioner be approved.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:
J. F. GREALEY,
Special Attorney, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

46 Before U. S. Board of Tax Appeals

Findings of fact and opinion

Filed February 29, 1928

Susie M. Root, executrix, 5 B. T. A. 696; George R. Dyer et al., 5 B. T. A. 711; and Provident Trust Company et al., 5 B. T. A. 1004, followed.

J. Snowdon Rhodes, Esq., for the petitioner; Frank T. Horner, Esq., for the respondent.

SIEFKIN: The facts are simple and are not in dispute. They are that prior to February 3, 1924, certain real estate in Pennsylvania was held by Beulah H. J. Woolston and her husband, Joseph L. Woolston, "their heirs and assigns, . . . as tenants by the entireties." Beulah H. J. Woolston died February 3, 1924, and the respondent included in her estate and subjected to estate tax the entire value of such real estate. The contested portion of the deficiency being considered results from such inclusion.

We have heretofore held that under the laws of Missouri there is no transfer, by reason of the death of one spouse, of any interest or estate of that spouse in an estate by the entirety to the surviving spouse, basing our decision upon a determination that the common-law doctrines of estates by the entirety obtains in Missouri, and concluding that inclusion of the value of real property as part of the gross estate of the decedent was without authority of law under the revenue act of 1921. Susie M. Root, executrix, 5 B. T. A. 696. We held to the same effect where the property was in New York and the revenue act of 1918 was being considered, George R. Dyer et al., 5 B. T. A. 711, and where the property was in Pennsylvania and where the revenue act of 1921 was being again considered, Provident Trust Company et al., 5 B. T. A. 1004. In this pro-
47 ceeding we also have the property situate in Pennsylvania, and are considering the revenue act of 1921, and we adhere to the principles adopted there and hold that the common-law doctrine of estates by the entirety obtains in Pennsylvania; that such doctrine constitutes not only a rule of law but a rule of property which is binding in considering whether or not there is a transfer by reason of the death of one "tenant," and that in fact there is no such transfer. We accordingly hold that the inclusion of the value of such real estate in the gross estate of the decedent was erroneous. See cases above cited and also James C. Murphy et al., 5 B. T. A. 952; Blount *v.* United States, 59 Court of Claims 328; United States *v.* Monroe, 10 Fed. (2d) 230, writ of error to the Supreme Court of the United States dismissed, January 3, 1927.

Reviewed by the board.

Judgment will be entered on 15 days' notice, under rule 50.

MARQUETTE dissents.

[Certificate to foregoing paper omitted in printing.]

48 Before U. S. Board of Tax Appeals

Order of redetermination

Entered May 12, 1928

Pursuant to decision of the board promulgated February 29, 1928, the respondent herein, to wit, on April 13, 1928, filed a proposed redetermination in estate tax, and the petitioner on May 7, 1928, filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided that there is an overpayment in estate tax in the amount of $22.79.

(Sgd.) FOREST D. SIEFKIN,
Member United States Board of Tax Appeals.

[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Petition of the Commissioner of Internal Revenue for a review of decision of the United States Board of Tax Appeals

Filed November 5, 1928

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant Attorney General, and C. M. Charest, general counsel, Bureau of Internal Revenue, and respectfully shows:

49 I

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that Beulah H. J. Woolston, a resident of the State of Pennsylvania, died on February 3, 1924; that she left a will which was duly admitted to probate on February 9, 1924, by the Orphans' Court of the city and county of Philadelphia, in the State of Pennsylvania; that Girard Trust Company, a Pennsylvania corporation, and Joseph L. Woolston, her surviving husband, were nominated in said will as executors thereof and were duly appointed by said court as such executors, and said Girard Trust Company, a corporation, and Joseph L. Woolston are now the duly appointed, qualified, and acting executors of the will of said deceased.

That on or about December 31, 1924, the said Girard Trust Company and Joseph L. Woolston, as such executors, filed a Federal estate tax return for the estate of Beulah H. J. Woolston, deceased,

with the collector of internal revenue at Philadelphia, Pennsylvania; that said Girard Trust Company and Joseph L. Woolston are inhabitants of the State of Pennsylvania.

II

The nature of the controversy is as follows, to wit:

That prior to the year 1923 certain real estate and premises situate in the city of Philadelphia and State of Pennsylvania, known as 429 West Chestnut Avenue, Chestnut Hill, in said city of Philadelphia, became vested in the said Beulah H. J. Woolston in fee simple. On April 27, 1923, the said Beulah H. J. Woolston (her husband joined in the deed) conveyed said premises to one
50 Guy B. Watton, his heirs and assigns, in fee simple. On April 30, 1923, the said Guy B. Watton conveyed the said premises to Joseph L. Woolston and Beulah H. J. Woolston, his wife (decedent), their heirs and assigns, as tenants by the entirety; and the title to said real estate remained in the same situation until and at the death of said Beulah H. J. Woolston.

The executors of the will of said Beulah H. J. Woolston, deceased, appellees herein, in filing an estate tax return for the estate of said deceased failed to include the value of the above-mentioned real estate (held by the deceased and her husband as tenants by the entirety as aforesaid) in the gross estate of said deceased for Federal estate tax purposes.

The Commissioner of Internal Revenue included the value of said real property in the estate of said deceased and subjected to estate tax the entire value of such real estate, and therefore determined a deficiency in estate tax in the sum of $2,205.32 under the provisions of section 402 (d) of the revenue act of 1921 and article 23 of regulations 68.

On January 25, 1926, the aforesaid executors filed a petition with the United States Board of Tax Appeals for the redetermination of the estate tax deficiency above mentioned. A hearing was held before said board on January 19, 1928; the opinion and interlocutory decision of the board was promulgated as of February 29, 1928; and the final order of redetermination of the Board of Tax Appeals was entered on May 12, 1928, in which it was ordered and decided that there is an overpayment in estate tax in the amount of $22.79.

The Board of Tax Appeals held that the common-law doctrine of estates by the entirety obtains in Pennsylvania; that such doctrine constitutes not only a rule of law but a rule of property which is binding in considering whether or not there is a transfer by
51 reason of the death of one tenant, and that in fact there is no such transfer; and further held that the inclusion of the value of the real estate so held by the decedent and her husband in the gross estate of the decedent was erroneous.

III

That said commissioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Third Circuit;

Wherefore he petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Third Circuit and transmitted to the clerk of the said court for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the said United States Circuit Court of Appeals for the Third Circuit.

IV

The commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the inclusion of the value of the real estate owned by Beulah H. J. Woolston and her husband as tenants by the entirety in the gross estate of Beulah H. J. Woolston, deceased, for Federal estate tax purposes was erroneous.

2. The Board of Tax Appeals erred in holding and deciding that where two persons hold real estate in Pennsylvania as tenants by the entirety that upon the death of one tenant there is no transfer of interest to the other tenant.

52 3. The Board of Tax Appeals erred in failing to hold and decide that the value of the real estate owned by said decedent and her husband as tenants by the entirety should be included in the gross estate of said decedent for Federal estate tax purposes.

4. The Board of Tax Appeals erred in failing to hold and decide that where two persons hold real estate by the entirety in the State of Pennsylvania, that upon the death of one of said persons there is a transfer of estate to the other person which is subject to tax under the Federal estate tax law.

5. The Board of Tax Appeals erred in entering its final order of redetermination that there is an overpayment in estate tax in the amount of $22.79.

6. The Board of Tax Appeals erred in failing to enter a final order of redetermination that there is a deficiency in estate tax due from the appellees herein as executors of the will of said deceased in the sum of $2,205.32.

(Sgd.) MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

[*Duly sworn to by C. M. Charest, jurat omitted in printing.*]

53 [Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Notice of petition for review

To GIRARD TRUST COMPANY,
N. E. Cor. Broad and Chestnut Streets,
Philadelphia, Pennsylvania.

To JOSEPH L. WOOLSTON,
429 West Chestnut Avenue,
Chestnut Hill, Philadelphia, Pennsylvania.

To J. SNOWDEN RHOADS,
601 Commercial Trust Building,
Philadelphia, Pennsylvania.

You and each of you are hereby notified that the Commissioner of Internal Revenue did on the fifth day of November, 1928,
54 file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated at Washington, D. C., this fifth day of November, 1928.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 7th of November, 1928.

(Sgd.) J. M. STEEN,
Vice President,
Executor of the Will of Beulah H. J. Woolston, Deceased.
(Sgd.) J. SNOWDEN RHOADS,
Attorney for Appellees.

[Certificate to foregoing paper omitted in printing.]

55 Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed November 10, 1928

To the CLERK, UNITED STATES BOARD OF TAX APPEALS:

In preparing the record in the above-entitled cause for review by the United States Circuit Court of Appeals for the Third Circuit you are requested to include the following documents:

1. The docket entries of proceedings before the board.
2. Pleadings before the board, consisting of petition and answer.
3. Findings of fact and opinion.
4. Final order of redetermination.
5. Petition for review.
6. Notice of filing petition for review with proof of service thereof.
7. This præcipe.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Receipt of a copy of the foregoing præcipe acknowledged this fourteenth day of November, 1928.

JOHN S. SINCLAIR, and
J. SNOWDON RHOADS,
Attorneys for Appellees.

[Certificate to foregoing paper omitted in printing.]

56 [Minute entry of argument and submission, April 10, 1929, omitted in printing.]

57 In United States Circuit Court of Appeals for the Third Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
vs.
GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, EXECUTORS OF THE estate of Beulah H. J. Woolston, respondents

No. 4025. March term, 1929

On petition for review of decision of the United States Board of Tax Appeals

Before BUFFINGTON, WOOLLEY, and DAVIS, *Circuit Judges*

Opinion

Filed Oct. 4, 1929

PER CURIAM.

Affirmed on authority of United States vs. Provident Trust Company of Philadelphia et al. Fed. (2d)

[File indorsement omitted.]

58 In United States Circuit Court of Appeals for the Third Circuit

No. 4025 (List No. 58). March term, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GIRARD TRUST CO. ET AL., EXRS. B. H. J. WOOLSTON, DEC'D., respondents

Judgment

Filed October 4, 1929

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

Philadelphia, October 4, 1929.

VICTOR B. WOOLLEY,
Circuit Judge.

[File indorsement omitted.]

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 In United States Circuit Court of Appeals

[Title omitted.]

Order substituting party petitioner

Filed November 22, 1929

In conformity with the motion of counsel for petitioner filed herein,

It is ordered that Robert H. Lucas, Commissioner of Internal Revenue, be substituted as petitioner in the above entitled cause for David H. Blair, former commissioner, and that the said cause be continued and maintained by the said Robert H. Lucas, Commissioner of Internal Revenue, as aforesaid.

Philadelphia, November 22, 1929.

Per curiam BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

61 [Certificate to foregoing paper omitted in printing.]

62 Supreme Court of the United States

No. 546. October term, 1929

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

63 Supreme Court of the United States

No. 547. October term, 1929

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File Nos. 34677, 34678. U. S. Circuit Court of Appeals, Third Circuit. Term No. 546. The United States of America, petitioner, vs. Provident Trust Company of Pennsylvania and Charles Sinkler, Administrators, etc. Term No. 547. Robert H. Lucas, Commissioner of Internal Revenue, petitioner, vs. Girard Trust Company and Joseph L. Woolston, executors, etc. Petition for writs of certiorari and exhibits thereto. Filed December 31, 1929. File Nos. 34677, 34678.

91919—30——3